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Assistant Director, OPC

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Legal Staff

Death and Disability Payments for Alien Trainees

1. This memorandum represents an attempt to list all compensation payable for the death or disability of an alien trainee resulting from personal injury sustained while in the performance of his duty, provided the injury or death is not caused by the willful misconduct of the trainee, or by the trainee's intention to bring about the injury or death of himself or of another, or by intoxication of the trainee.
2. The fact that a trainee is an alien is not of paramount importance in this question. As long as he is an "employee" of the United States, he is entitled to the benefits of the Federal Employees' Compensation Act. For the purposes of the aforementioned legislation, an "employee" includes all civil officers and employees of all branches of the United States Government (including officers and employees of instrumentalities of the United States wholly owned by the United States), as well as persons rendering personal services, without compensation or for nominal compensation, in any case in which acceptance or use of such services is authorized by law.
3. It is equally apparent that classifying an alien as a "trainee" does not prevent his status from being that of an "employee." As long as an employer-employee relationship is present, the Bureau of Employees' Compensation will accord the benefits due an employee.
4. From a legal standpoint, there are numerous factors which must be considered in determining whether a trainee is an "employee." Each case should be determined on its own merits, but each trainee would seem to fall into one of the following three general categories:
 - a. Trainees who legally are "employees" and hence entitled to full benefits of the FECA.
 - b. Trainees who clearly are not "employees," but to whom we may wish to award benefits. While it would be possible to award such trainees nothing, this may not be advisable for policy reasons. Also, as a practical matter, experience indicates that claims will be made regardless. Therefore, it may be advisable to agree to award certain benefits, perhaps an amount equal to some fraction of the FECA benefits.
 - c. Trainees who are "independent contractors." Generally, an "independent contractor" is one who undertakes to accomplish a given result, according to his own methods, and without being subject to the control of another. It is possible that certain alien trainees will fall into this category. "Independent contractors" are not automatically entitled to any benefits, as employees are through their status, and this is true under the FECA. Whether such persons should be awarded benefits by contract is a matter of policy.

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5. FICA Benefits. The minimum compensation to which each trainee "employee" would be entitled is provided for in the Federal Employees' Compensation Act. The following provisions are applicable:

a. Compensation for death. If death results from the injury, the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay:

(1) Widow. To the widow, if there is no child, forty-five per centum. This compensation shall be paid until her death or marriage.

(2) Widower. To the widower, if there is no child, forty-five per centum if wholly dependent for support, by reason of his physical or mental disability, upon the deceased employee at the time of her death. This compensation shall be paid until his death or marriage or until he becomes capable of self-support.

(3) Children. To the widow or widower, if there is a child, forty per centum and in addition thereto fifteen per centum for each child, not to exceed a total of seventy-five per centum for such widow or widower and children. The compensation payable on account of any child shall cease when he dies, marries, or reaches the age of eighteen, or, if over eighteen, and incapable of self-support, becomes capable of self-support.

(4) Orphan children. To the children, if there is no widow or widower, thirty-five per centum for one child and fifteen per centum additional for each additional child, not to exceed a total of seventy-five per centum, divided among such children, share and share alike. The compensation of each child shall be paid until he dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support.

(5) Parents. To the parents, if one is wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per centum; if both are wholly dependent, twenty per centum to each; if one is or both are partly dependent, a proportionate amount in the discretion of the Federal Security Administrator. These percentages shall be paid if there is no widow, widower or child. If there is a widow, widower or child, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, and children, will not exceed a total of seventy-five per centum.

(6) Other dependents. To the brothers, sisters, grandparents and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his death, twenty per centum to such dependent; if more than one are wholly dependent, thirty per centum, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more partly dependent, ten per centum divided among such dependents share and

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share alike. The above percentages shall be paid if there is no widow, widower, child, or dependent parent. If there is a widow, widower, child, or dependent parent, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower, children, and dependent parents, will not exceed a total of seventy-five per centum.

(7) Term of payments for parents and dependents covered in the above paragraph. The compensation of each beneficiary shall be paid from the time of death, until he, if a parent or grandparent, dies, marries, or ceases to be dependent, or if a brother, sister, or grandchild dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support.

b. Burial benefits. If death results from the injury, the United States shall pay, to the personal representative of the deceased employee or otherwise, funeral and burial expenses not to exceed \$400.00, in the discretion of the Federal Security Administrator.

c. Compensation for total disability. If disability is total, the United States shall pay to the disabled employee during such disability a monthly monetary compensation equal to sixty-six and two-third's per centum of his monthly pay. This is known as basic compensation for total disability. Loss, or loss of use, of both hands, or both arms, or both feet, or both legs, or both eyes or the sight thereof, shall constitute permanent total disability.

d. Compensation for partial disability. If disability is partial, the United States shall pay during such disability a monthly monetary compensation equal to sixty-six and two-third's per centum of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of such partial disability, which shall be known as his basic compensation for partial disability.

e. Payments in case of permanent disability which involves solely the loss, or loss of use, of a member or function of the body, or disfigurement, are covered in Appendix A.

f. Medical care. For any injury sustained by an employee in the performance of duty, whether or not disability has arisen, the United States shall furnish to the employee all services, appliances and supplies prescribed or recommended by qualified physicians.

g. Vocational rehabilitation. Any permanently disabled individual whose disability is compensable under the FECA is entitled to vocational rehabilitation services.

6. Miscellaneous Provisions of the FECA.

a. Effect of a waiver. Any attempt to obtain a waiver from an "employee" would be a waste of effort, because, even if obtained, it would

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not change the application of the Federal Employees' Compensation Act. There is no provision in the Act, but regulations issued pursuant to the Act provide that no superior is authorized to require an employee to waive his right to require compensation.

b. Automatic coverage. Coverage of the FECA is automatic, requiring no payment or contribution by the alien trainee.

c. Election of benefits. Whenever any person is entitled to receive any benefits under the FECA and is also automatically entitled to receive from the United States any benefits because of injury or death under any other Act of Congress, such person shall elect which benefits he shall receive. In other words, he cannot have the benefits of both. He must choose between the two. (This does not apply to the proceeds of an insurance policy).

d. Exclusiveness of remedy. The liability of the United States under the FECA with respect to the injury or death of an employee is exclusive. In other words, an employee who is injured in the line of duty cannot sue the United States Government under any Federal tort liability statute; he is limited to the FECA benefits.

e. Lower scale of benefits for noncitizen employees. The FECA permits the Federal Security Administrator to establish a smaller scale of payments for noncitizen employees of the United States. However, there are occasions on which the Administrator will pay a noncitizen on the scale applicable to citizens of the United States. The Administrator has wide discretionary powers in this matter, and it is possible that this office will be able to arrange payments on the United States scale when desirable.

7. Pertinent Comments on the FECA. It would seem advisable to emphasize the full meaning of the FECA in connection with this problem. It doesn't provide for a mere token payment; it is a comprehensive legislative enactment and its benefits are extensive. For example:

a. Amount of payments. A recent survey concerning total amounts paid in those cases where death had resulted revealed average payments of \$12,000.00 to a wife with no children, and \$18,000.00 to a wife with children. These amounts would be even greater at today's wage scale.

b. Taxation element. All payments made under FECA are tax-free, and, at today's tax rates, this item is of singular importance.

c. Rehabilitation. Steps taken in this field should be encouraging to any person who is engaged in a hazardous activity. In the past, men with no hope of ever being able to work again have been rehabilitated in such a way that they now lead full and useful lives. This work is continuing and such benefits will be available under the FECA.

8. Benefits Provided by Contract. As mentioned above, only "employees" are entitled to the benefits of the FECA. If an alien trainee is not legally

an "employee," any death or disability payments for him must arise out of his contract. It is possible to award such persons nothing, insofar as legal considerations are concerned. However, this may prove impractical from an operational standpoint. In such cases it may be advisable to insert a benefit provision in the contract. For example, CIA agrees at times to pay a lump sum to the beneficiary of an agent who is killed in the line of duty. In the event of disability, CIA could agree to award an amount equal to some fraction of the FECA benefits.

9. Missing Persons Act. The benefits of this legislation are available to civilian employees of the United States who are officially determined to be absent in a status of missing, missing in action, interned in a neutral country, captured by the enemy, beleaguered or besieged. (50 U.S.C.A., App. § 1001-1002). This Act prescribes continuance of pay and allowances during the periods concerned. Provided an alien trainee has the status of an "employee," he is entitled to the provisions of this legislation. There is a further provision that the employee must be assigned for duty or serving outside the continental United States or in Alaska before he is entitled to the benefits of this Act.

The operation of this legislation is automatic; it requires no payment from the employee.

SUMMARY

1. Every alien trainee whose status is that of an "employee" is automatically entitled to the death and disability benefits of the FECA. In order to emphasize the comprehensive scope of this Act, its terms have been explained in some detail.

2. If an alien trainee is not an "employee," he is not legally entitled to the benefits of the FECA, and any benefits he receives must be derived from his contract.

3. An "independent contractor," that is, one who undertakes to accomplish a given result, according to his own methods, and not subject to the control of another, is not legally entitled to any death or disability benefits. Any benefits for such persons must be spelled out in the terms of each contract.

4. Benefits of the Missing Persons Act are available only to those trainees whose status is that of an "employee."

5. Whether or not an individual is an "employee" depends on the facts in each case, not necessarily on the form of his agreement with the Government. There is, therefore, some leeway and each case in which there is doubt should be forwarded to the Legal Staff with a recommendation and a request for a ruling.

cc: [REDACTED] WPC (2)

John S. Warner, OSO

Training

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APPENDIX A

The FECA includes a special schedule of added benefits for employees who sustain permanent injuries involving dismemberment or functional loss of certain bodily members. These benefits are payable in addition to amounts paid for temporary disability. For example, if an employee is so unfortunate as to lose an eye due to a work injury, he will receive, in addition to compensation paid for temporary disability, an award of one hundred and sixty extra weeks of compensation. (Such awards will be paid at the rate of sixty-six and two-thirds per centum of the employee's monthly pay). This award will be made in periodic payments, rather than in a lump sum.

These scheduled awards, as they are called, are made not only for dismemberment of a part of the body, but also for any permanent functional loss of the various bodily members listed in the schedule. The following schedule is taken from the law, and although it is not complete, is representative of the law's benefits:

<u>Anatomical Member</u>	<u>Weeks</u>
Arm.....	312
Leg.....	288
Hand.....	244
Foot.....	205
Eye.....	160
Thumb.....	75
First Finger.....	46
Great Toe.....	38
Second Finger.....	30
Third Finger.....	25
Toe (other than Great Toe).....	16
Fourth Finger.....	15
Complete Loss of Hearing (One Ear).....	52
Complete Loss of Hearing (Both Ears).....	200

In instances of 100% loss or impairment of major members where loss of earning capacity continues, compensation payments may extend beyond the period provided by the schedule. Major members include the arm, leg, hand, foot, eye, and total deafness. In addition, proper and equitable compensation not to exceed \$3,500.00 is to be awarded for serious disfigurement of the face, head, or neck, where such disfigurement is of a character likely to handicap a person in securing or maintaining employment.